

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

PHIL BREDESEN,  
Governor of the State of Tennessee,

Plaintiff,

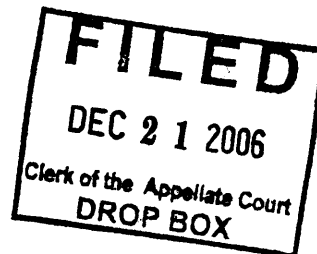
v

TENNESSEE JUDICIAL  
SELECTION COMMISSION,

Defendant.

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No. \_\_\_\_\_  
(Appeal from the Chancery Court of  
Davidson County No. 06-2275 III)



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**MEMORANDUM IN SUPPORT OF  
MOTION FOR SUPREME COURT TO REACH DOWN PURSUANT TO  
T.C.A. §16-3-201(D)(2)(3)(4), FOR STAY OF TRIAL COURT'S  
FINAL ORDER AND FOR EXPEDITED HEARING**

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Comes now, J. Houston Gordon, necessary party/intervenor below, and in support of his Motion for Supreme Court to Reach Down Pursuant to T.C.A. §16-3-201(d)(2)(3)(4), for Stay of Trial Court's Final Order and for Expedited Hearing, would state:

**STATEMENT OF CASE**

1. This matter involves interpretation of the statutorily mandated procedures established by the enactment of the Tennessee Plan, T.C.A. §17-4-101 *et seq.* (the "Act") and the necessity for correction of a defect in procedure that occurred as a result of the withdrawal of one nominee from a Judicial Selection Commission certified panel of three persons submitted to the Governor to consider for appointment to the Tennessee Supreme Court.
2. On the face of the Complaint for Declaratory Judgment filed by the Attorney General on behalf of the Governor of Tennessee, this matter also involves a fundamental dispute

between the Executive Branch of the government of Tennessee and the Judicial Branch of the government of Tennessee. It involves the interpretation of the statutory scheme for the selection process for nominees to the Tennessee Supreme Court, Tennessee's highest court. Its resolution will directly impact the rights of applicants to be considered for appointment to the Court.

3. On September 18, 2006, the Plaintiff, Governor of the State of Tennessee, filed a declaratory judgment action against the Judicial Selection Commission, a part of the Judicial Branch of Tennessee government. (Appendix 1)
4. The complaint sought declaratory relief and interpretation of the provisions of T.C.A. §§17-4-101, *et seq.*, Tennessee Plan, the legislation that establishes the procedures, obligations and respective responsibilities of the Governor and the Judicial Selection Commission in the finding, nominating and appointing of Tennessee's appellate judges, including those to serve on the Tennessee Supreme Court.
5. Specifically, the Governor sought to have the trial court interpret T.C.A. §17-4-112(a) in a manner that requires "that the Judicial Selection Commission, upon rejection of the Governor of the three nominees contained in the first panel" is required to submit a second panel that contains three new nominees and can not include any of the nominees from the rejected panel. (Complaint at page 9, ¶3).
6. In addition, the Governor sought to have the trial Court declare that the panel of three nominees, selected and certified by the Commission on September 7, 2006 as being the best qualified persons available to fill the vacancy on the Supreme Court, is not a validly constituted panel under T.C.A. §17-4-112(a) because it contained the name of "a rejected nominee from the first panel." (Complaint, page 9, ¶4) Movant, Gordon is the "rejected

nominee.” The relief sought by the Governor would eliminate Gordon from consideration for appointment

7. Finally, the Governor sought a declaration that he has “no legal duty” to make any appointment to fill the vacancy until the Judicial Selection Commission submits a panel that is “validly constituted in accordance with T.C.A. §17-4-112(a)”, i.e., a panel that does not include Gordon’s name.
8. Gordon has been three times deemed by the Judicial Selection Commission as being one of the three best qualified persons available for service to fill the vacancy on the Tennessee Supreme Court pursuant to T.C.A. §17-4-109. His name was so certified on April 20, 2006, the second time to the Governor as a member of a panel on July 18, 2006, and on September 7, 2006.
9. On November 14, 2006, the Defendant Judicial Selection Commission filed its Answer to the Complaint for Declaratory Judgment. (Appendix 2)
10. The next day, November 15, 2006, the Governor filed a motion for summary judgment. (Appendix 3)
11. On November 16, 2006, the Judicial Selection Commission filed its Motion for Order Naming A Necessary Party Pursuant to Rule 19.01 and T.C.A. §29-14-107 designating Movant as that necessary party. (Appendix 4)
12. Apparently, an agreed Order was entered on November 6, 2006 wherein the Governor and the Judicial Selection Commission agreed that all motions for summary judgment would be heard on December 13, 2006.

13. On November 21, 2006, the Governor responded that he did not consider Movant a necessary party but did not oppose Gordon's being named a party so long as all motions for summary judgment would still be heard on December 13, 2006. (Appendix 5)
14. Recognizing that the Judicial Selection Commission was not fully protecting Movant's rights on November 27, 2006, Gordon filed his Motion to Intervene and as required by Rule 24, Tennessee Rules of Civil Procedure, attached his Counter-Complaint and Cross-Complaint for Declaratory Judgment (Appendix 6) and filed his Memorandum in Support of Motion to Intervene. (Appendix 7)
15. On November 28, 2006, Gordon filed Requests for Admissions and Interrogatory to the Judicial Selection Commission (Appendix 8) and to the Plaintiff (Appendix 9).
16. On that same date, Gordon filed his Motion for Additional Time for Discovery or, in the Alternative, Intervenor's Initial Response in Opposition to Plaintiff's Motion for Summary Judgment. (Appendix 10)
17. On November 28, 2006, Gordon filed Intervenor's Response to Statement of Undisputed Facts in Support of Plaintiff's Motion for Summary Judgment. (Appendix 11)
18. An Agreed Order was subsequently entered allowing George T. Lewis to intervene. (Appendix 12)
19. On November 30, 2006, the trial court entered its order requiring the Governor and the Judicial Selection Commission to file responses to the motions to intervene by noon on December 4, 2006 and requiring replies to be filed by December 5, 2006 at 4:00 p.m. (Appendix 13)
20. On December 4, 2006, the Governor filed his Response in Opposition to J. Houston Gordon's Motion to Intervene. (Appendix 14)

21. On December 5, 2006, Movant filed his Reply to Plaintiff's Response In Opposition to J. Houston Gordon's Motion to Intervene asserting that no discovery of facts was necessary and that Gordon should not be allowed to assert any claims or counterclaims as an intervenor. (Appendix 15)
22. On December 6, 2006, the trial court entered its Memorandum and Order finding that Gordon was a necessary party under Rule 24.01 and also ruling that Gordon's interests were separate and distinct from the Commission's interest and that his interests (as set forth in his proposed counter-complaint and cross-complaint) would not be adequately protected by the existing parties. The trial court then, *sua sponte*, struck Gordon's requests for admissions and interrogatory to the Plaintiff and Defendant stating, "They are, for the most part, statements of conclusions of law or facts that are not disputed." (Appendix 16)
23. On December 8, 2006, George T. Lewis filed his Answer and Counter Claim. (Appendix 17) and Motion for Summary Judgment, (Appendix 18), Rule 56.03 Statement of Undisputed Facts (Appendix 19) and his Memorandum in Support of Summary Judgment (Appendix 20).
24. On December 12, 2006, Plaintiff filed the Reply to Intervenor Lewis' Counter Claim (Appendix 21) and to his Statement of Undisputed Facts. (Appendix 22)
25. On December 13, 2006, Gordon filed his counsel's Rule 56 affidavit setting forth "facts" that required discovery and which would create disputes of fact if the Plaintiff denied that the only reason Plaintiff had given for rejecting Gordon and Lewis was based on a race-based classification. (Appendix 23)
26. On December 13, 2006, oral argument was heard.

27. On December 14, 2006, the trial Court entered her order granting summary judgment to Plaintiff and ordering Gordon's name to be removed from the September 7, 2006 panel, implicitly denying Gordon's discovery request and entered a "final judgment". (Appendix 24)

### **STATEMENT OF FACTS**

1. In early 2006, Justices Anderson and Birch announced their retirements from the Supreme Court effective August 31, 2006, thereby creating two vacancies as of the latter date.
2. At the initial April 20, 2006 public hearing and interviews to fill the first vacancy, there were eleven applicants, including three African Americans. Among the applicants, there were three appellate judges, three trial judges, and five practicing attorneys.
3. After reviewing the applicants, conducting their investigation and inquiries, holding public hearings and having private interviews with the applicants, the Judicial Selection Commission selected and certified to the Governor that the three "highest qualified persons" for appointment to the court among the applicants were Court of Appeals Judge Gary Wade, Chancellor Richard Dinkins and Intervenor.
4. Thus, this panel of nominees included an appellate judge, a trial judge, who is an African American, and Intervenor, a practicing attorney.
5. From this panel, after interviews with each of the nominees, the Governor appointed Judge Wade to the Supreme Court as the person to fill one of the vacancies.
6. The Judicial Selection Commission gave public notice pursuant to T.C.A. §17-4-109(a)(2) and (b), that it would accept applications for nominations to fill the remaining vacancy on the Supreme Court and encouraged potential applicants to apply.

7. At the July 17, 2006 public hearing and interview for the remaining vacancy, there were nine applicants, including four African Americans. Among the nine applicants, there were two appellate judges, three trial judges, three practicing lawyers, and one lawyer who served as the Chief Administrative Officer for Shelby County.
8. These nine individuals submitted applications and appeared before the Commission for the public hearing on July 17, 2006. Each had speakers and/or written statements in support of their application. Each was questioned in a private interview conducted by the members of the Commission as a whole. The Commission then met in executive session and, by majority vote as required by T.C.A. §17-4-109(e), selected three persons as being those whom the Commission “deemed best qualified and available to fill the vacancy” on the Supreme Court.
9. On July 18, 2006, the Commission certified the names of Chancellor Richard H. Dinkins, George T. “Buck” Lewis, and Intervenor as those three persons deemed to be “best qualified and available to fill the vacancy” on the Supreme Court pursuant to T.C.A. §17-4-109(e). This panel of nominees included a trial judge who is an African American and nominated for the second time, a practicing attorney, and Gordon, a practicing attorney, also nominated for the second time. (Exhibit A to Complaint for Declaratory Judgment.)
10. On July 24, 2006, Chancellor Dinkins formally withdrew his name from the panel of nominees certified by the Commission as a nominee for appointment to the Supreme Court. The panel of three became a panel of two, making it incomplete. This incomplete panel consisted of two individuals, Lewis and Gordon, neither of whom are members of a minority. (Exhibit B to Complaint for Declaratory Judgment.)

11. At approximately noon on July 24, 2006, Gordon was informed by the Deputy Governor that Dinkins had withdrawn and that the Governor was “returning the panel” to the Commission.
12. Under date of July 24, 2006, the same day as Chancellor Dinkins’ withdrawal letter, a letter from the Governor was faxed and mailed to the chair of the Judicial Selection Commission, in which the Governor stated that he was **“writing to return to the Judicial Selection Commission the panel of nominees certified to me last week for the vacancy on the Tennessee Supreme Court.”** The Governor requested that the Commission “submit a new panel of nominees.”

In his letter, the Governor stated:

This State has been privileged over the last thirteen years to have an excellent Supreme Court that reflects the diversity of Tennessee. As you know, I have always sought to appoint judges who meet the highest professional and personal standards. Among such highly qualified persons, diversity is a significant factor that I believe should be considered. With Chancellor Dinkins’ withdrawal, I no longer have the opportunity to consider that factor. (Emphasis added.)

No other “reason” was given for the return of the panel. In the letter, he requested “that the Commission send me a new panel of nominees that include qualified minority candidates” (Emphasis added). (Exhibit C to Complaint for Declaratory Judgment.)

13. A special public meeting was called by the Judicial Selection Commission on August 8, 2006. At the public meeting, various members of the Commission expressed concern as to whether the “return” of the nominees on the panel was a “rejection” under T.C.A. §17-4-112 or simply a “return” of the incomplete panel. If it was a rejection, there was concern as to whether the Governor had stated sufficient valid and/or lawful “reasons” in writing for the Judicial Selection Commission for “rejection of the panel” as mandated by



T.C.A. §17-4-112(a). After lengthy discussion, the majority of the committee voted to request that the Governor clarify in writing if he intended to reject the entire panel by his July 24, 2006 letter and, if so, to state his “reasons for rejecting the panel.” On August 9, 2006, the Chairman of the Judicial Selection Commission forwarded this written request to legal counsel for the Governor. (Exhibit D to Complaint for Declaratory Judgment.) The letter speaks for itself.

14. On the same day, by letter dated August 9, 2006, the Governor responded as set forth in Exhibit E attached to the Complaint for Declaratory Judgment. The Governor stated that he had, in fact, “rejected the first panel of nominees.” The Governor, however, stated no further “reasons for the commission” as mandated by T.C.A. §17-4-112 and wrote, “I rejected the panel for the **reason** stated in my previous letter.” (Emphasis added.) The only “reason” stated in his previous letter was that Chancellor Dinkins had withdrawn his name for consideration leaving the panel without a minority candidate and that the Governor, in seeking diversity, requested the Commission to send “qualified minority candidates.” No “reasons” whatsoever related to the qualifications or fitness of the two remaining nominees were stated.
15. On August 22, 2006 the Commission met in a public hearing, and after a lengthy discussion of the Governor’s August 9, 2006 letter, adopted by majority vote the resolution. (Complaint for Declaratory Judgment at Exhibit F). The resolution allowed all earlier applicants, including Lewis and Gordon, to be considered for the second panel. A majority of members, including all minority members of the Commission who were present at the hearing, voted to allow the two remaining nominees from the first panel to apply for the second panel. The Commission further determined that all earlier applicants

would be considered unless an applicant affirmatively directed the Commission not to consider the applicant. It is submitted that the actions of the Commission were consistent with its mandated statutory duties and obligations found in T.C.A. §§17-4-109(a)(2), (b)(c)(d)(e) and 112.

16. Seventeen individuals, including 9 minority applicants, timely qualified as applicants for the vacancy.
17. On September 5, 2006, the Commission met and after its public hearing, inquiry, and investigation, and private interviews with the 8 applicants, determined that the qualifications of Judge D'Army Bailey, Judge William C. Koch, and Gordon were such that they were deemed by the Commission to be the three persons "best qualified" to fill the vacancy on the Supreme Court. The names of these three nominees were certified as members of the second panel to the Governor by letter dated September 7, 2006. Obviously, the Commission found them, after considering the qualifications of all available applicants, to be the three "best qualified to fill the vacancy." A true and correct copy of the letter certifying this second panel of nominees is shown as Exhibit G to the Complaint for Declaratory Judgment.
18. Gordon is an attorney licensed to practice in the State of Tennessee, certified by the Judicial Selection Commission as one of three nominees deemed by the Commission to be the three (3) persons "best qualified" to fill a vacancy on the Tennessee Supreme Court. He is qualified to be considered for appointment.

### **RELIEF REQUESTED**

On December 14, 2006, the trial court entered her final order and judgment in this case. In that order, the court not only interpreted the language of the statute rejecting Gordon's argument that a procedural defect arising out of the statutorily mandated procedure had occurred, but specifically addressed and rejected the constitutional preemptive issues raised by the Commission, Gordon and Lewis, and then proceeded to interpret the statute's language found in T.C.A. §17-4-112(a) to uphold the Governor's actions.

Pursuant to T.C.A. §16-3-201(d), this Court, may upon motion of a party, assume jurisdiction in undecided cases where a notice of appeal has been filed in a case of "unusual public importance" involving "compelling public interest" and/or involving "public office" and "issues of constitutional" law.

There can be no more "compelling public interest" nor case of more "unusual public importance" than one concerning the selection and appointment to those who are to fill the vacancies on our Supreme Court.

Where there is a fundamental dispute between co-equal branches of government that involves the interpretation of their statutory duties and constitutional law, this Court is the appropriate and constitutionally mandated body to resolve those disputes under Art. II, §2 and Art. VI, §§2 and 3, Tennessee Constitution.

Pursuant to Rule 2, Tennessee Rules of Appellate Procedure, and Rule 62.08, Tennessee Rules of Civil Procedure, the Honorable Court, under these circumstances, is requested to assume jurisdiction over this case under T.C.A. §16-3-201 and Art. VI, §§2 and 3, Tennessee Constitution, stay the trial court's order, suspend the rules of appellate procedure, and order an expedited briefing and hearing in this matter.

RESPECTFULLY SUBMITTED this the 22<sup>nd</sup> day of December, 2006.

BY:

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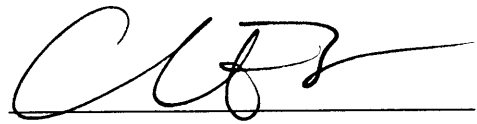
**CERTIFICATE OF SERVICE**

Counsel for Intervenor certifies that on this the 22<sup>nd</sup> day of December 2006, a true and correct copy of the foregoing was mailed and/or hand delivered to:

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A handwritten signature in black ink, appearing to be "R. E. Cooper, Jr.", written over a horizontal line.